NO. 79-6015

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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SUPREME COURT, U.S.

* * * * * *

MARVIN RAY ROBERTSON, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

* * * * * *

APPEAL FROM THE
COURT OF CRIMINAL APPEALS OF TEXAS
JURISDICTIONAL STATEMENT

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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * * * * *

MARVIN RAY ROBERTSON, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

* * * * * *

APPEAL FROM THE
COURT OF CRIMINAL APPEALS OF TEXAS

THE OPINIONS BELOW

The Per Curiam opinion of Panel 1 of the Court of Criminal Appeals of Texas was unpublished, but reported at 586 S.W. 2d 877, A copy of the decision, served on counsel, is attached as Appendix A. The Motion for Rehearing, En banc, was denied without opinion.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) This is a criminal prosecution against the appellant, Marvin Ray Robertson. Appellant was charged and convicted in the Criminal District Court of Dallas County, Texas, of aggravated robbery in violation of Section 29.03 of the Texas Penal Code. At the punishment stage of the trial, the jury was requested to find whether appellant had been previously convicted of two other felonies. Having found in the affirmative, appellant was sentenced to life imprisonment under Section 12.42(d) of the Texas Penal Code. Appellant contended Section 12.42(d) is invalid because actions under it are prohibited by the Eighth and Fourteenth Amendments to the Constitution of The United States. The decision of the Court of Criminal Appeals of Texas was in favor of the validity of Section 12.42(d).

(ii) The judgment, or decree, sought to be reviewed is the ruling of Panel 1 of the Court of Criminal Appeals of Texas delivered September 19, 1979. A Motion for Rehearing En banc was denied on October 31, 1979. The Notice of Appeal was submitted to the Court of Criminal Appeals of Texas on January 24, 1980.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(iv) Cases sustaining the jurisdiction of this Court are:

> Gardner v. Florida, 97 S. Ct. 1197, 430 U.S. 349;
> Cohen v. California, 91 S. Ct. 1780, 403 U.S. 15;
> Bantam Books, Inc. v. Sullivan, 83 S. Ct. 631, 372 U.S. 58

(v) The validity of the procedures under Section 12.42(d) of the Texas Penal Code is here involved. The full text of that Section is as follows:

> "If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life."

QUESTION PRESENTED BY THE APPEAL

The following question is presented by this appeal: Do the sentencing procedures requiring a life sentence under the habitual felony statute of the State of Texas violate due process and result in cruel and unusual punishment as forbidden by Eighth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE FACTS OF THE CASE

On May 18, 1977, Mike Howell was working as the Manager in an auto parts store when, at approximately 4:00 o'clock p.m., a black male entered the store; he asked the salesman for a fuse for his air conditioner or radio, and asked Howell for a radiator hose. As Howell was looking up the type of hose in the catalogue, the robber pulled a hand gun and told him to move away from the counter. The robber then demanded the hand gun behind the counter and all the money. Howell gave him the gun in a holster and put approximately $350.00 in a sack.

On May 25, 1977, appellant was arrested by the Dallas Police Department and charged with aggravated robbery. Appellant entered a plea of Not Guilty, and requested a jury trial on all issues including guilt and punishment.

On the 16th and 17th of August, 1977, appellant was tried and convicted by a jury on his plea of Not Guilty to the offense of aggravated robbery. At the punishment stage of the trial, the State alleged appellant had been convicted twice before of felony offenses. To these charges appellant plead Not True. By fingerprint analysis appellant was identified as an individual who had been convicted of two felony offenses. Appellant offered no testimony. At the conclusion of the punishment stage of the trial, the jury was instructed if they found appellant had, in fact, been convicted twice before of felony offenses, they would cease deliberations and return that verdict into Court. The jury found the allegations of two prior felony convictions to be true. Thereafter, the Court assessed the punishment of appellant at life imprisonment in the Texas Department of Corrections. During the punishment stage of the trial, appellant was directed by the Court not to disclose to the jury the effect of their findings regarding prior felony convictions.

On August 31, 1977, appellant gave Notice of Appeal to the Court of Criminal Appeals of Texas. The case was heard by the Court of Criminal Appeals on April 10, 1979. In a decision of Panel 1, delivered September 19, 1979, the conviction of appellant was affirmed. The Court of Criminal Appeals specifically rejected the contention of appellant that the sentencing procedures used at his trial, which resulted in imposition of a life sentence, were violative of due process and, thus, constituted cruel and unusual punishment in violation of the Constitution of the United States. Appellant timely filed a Motion for Rehearing, En banc, which was denied October 31, 1979.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

The question presented by this appeal is whether a State Court, in its sentencing procedures, can disregard the statutory obligation of individualized sentencing and, thus, violate appellant's right of

due process to the extent the sentence imposed constitutes cruel and unusual punishment. In Lockett v. Ohio, 98 S. Ct. 2954, 438 U.S. 586, this Court recognized the right to individualized sentences in non-capital cases rests on public policy enacted into statute and not constitutional commands. The State of Texas has a public policy which mandates individualized sentences. Specifically, Section 1.02(3) of the Texas Penal Code states one objective is "to prescribe penalties that are proportionate to the seriousness of the offenses and permit recognition of differences of rehabilitation possibilities among individual offenders." This objective and policy has been recognized by the Court of Criminal Appeals of Texas in Jurek v. State, 522 S.W. 2d 934 (1975). Amplifying, in Jurek, it was held:

> "Some discretion is inherent and desirable in any system of justice, from arrest to final judgment. . . . To eliminate all discretion on the part of the jury would be to risk elimination of that valuable element which permits individualization based on consideration of all extenuating circumstances and would eliminate the element of mercy, one of the fundamental traditions of our system of criminal jurisprudence." Id. at 940

Having recognized the right to individualized sentencing, it follows the procedures used must afford a defendant the right to meaningfully participate at the punishment stage of the trial.

This statutory right means a defendant can only be assessed a "mandatory" life sentence after the jury has considered all the factors surrounding both the particular offense and the individual defendant. Otherwise, there is no effective way a defendant can seek the mercy which the State of Texas has provided for by statute.

As pointed out in Gardner v. Florida, 430 U.S. 349, 358; 97 S. Ct. 1197, 1204 (1977):

> ". . . it is now clear that the sentencing process, . . ., must satisfy the requirements of the due process clause. . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process."

This is exactly the situation presented by this appeal. The trial Court's action precluded appellant from presenting any evidence in mitigation of his sentence. As in capital cases, a life sentence may

be imposed automatically, but only after the jury considers all relevant factors. Appellant was precluded from having these factors considered by the instructions of the trial court during the trial as well as the instructions given to the jury. Significantly, it is only in situations where the State seeks punishment under Texas Penal Code Section 12.42(d) that a defendant's rights are infringed. All other sentencing statutes, both capital and non-capital, provide for individualized sentencing.

This right to present evidence in mitigation of the allegations made by the State was clearly recognized by this Court in Pennsylvania v. Ashe, 302 U.S. 51; 58 S. Ct. 59, when it stated:

> "For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." 302 U.S. at 55, 58 S. Ct. at 61. (Emphasis added)

The State of Texas has recognized this requirement in every situation except those arising under Section 12.42(d). All other non-capital sentencing statutes provide for individualized sentences. The capital sentencing statute specifically requires it. Only the statute applied to appellant prevents consideration of mitigating factors.

Even though the right to individualized sentencing is one created by State statute, rather than Constitutional provision, it is still one which comes within the due process protection of the Fourteenth Amendment. Otherwise, the right would be meaningless. Further, creating a right to individualized sentencing and then preventing appellant from effectively exercising that right, constitutes cruel and unusual punishment in violation of the Eighth Amendment of the U. S. Constitution. As this Court held in Jurek v. Texas, 428 U.S. 262, 271; 96 S. Ct. 2950, 2956:

> ". . . a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held . . . to be required by the Eighth and Fourteenth Amendments."

While the foundation of, or the right to, individualized sentencing may be either a particular State statute or a Constitutional command;

once established, it is entitled to the protection of due process in any and all circumstances.

There can be no doubt appellant was denied the right to meaningfully participate in the sentencing procedure. First, the District Attorney filed a motion which was granted by the trial court preventing appellant's attorney from informing the jury as to the effect of its verdict. (Record, p. 20) Appellant's attorney was also instructed he could not give the jury any information not contained in the Court's charge. (Transcript, p. 104) The instructions to the jury were to only consider whether appellant had been twice before convicted of felonies. (Record, p. 34) Thus, there was no opportunity to present any mitigating evidence. Only aggravating circumstances were considered. Ultimately, the only facts considered were prior convictions. Simply stated, appellant could not participate at all at the sentencing hearing.

CONCLUSION

The State of Texas has established a right to individualized sentences for criminal defendants. However, defendants, such as Appellant, who are prosecuted under the habitual felony statute, are denied this right. Therefore, the procedures followed by the State of Texas under Texas Penal Code Section 12.42(d) violate Appellant's right to due process and the result constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. For these reasons, this statute must be held invalid.

Respectfully submitted,

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MARVIN RAY ROBERTSON, Appellant

NO. 57,555 v. - - - Appeal from DALLAS County

THE STATE OF TEXAS, Appellee

O P I N I O N

This appeal follows conviction for the offense of aggravated robbery. Appellant, having been tried on an indictment enhanced according to the provisions of V.T.C.A. Penal Code, Section 12.42(d), was sentenced to life confinement.

On May 18, 1977, Mike Howell was working as the manager of Indy Auto Parts Store when at approximately 4:00 p.m. appellant entered the store; he asked a salesman for a fuse for his air conditioner or radio and asked Howell for a radiator hose. As Howell was looking up the type of hose in a catalogue, appellant pulled a handgun and told him to move away from the counter. Appellant then demanded the handgun behind the counter and all the money. Howell gave appellant the gun in a holster and put approximately $350.00 in a sack. Appellant fled from the store and was thereafter apprehended on May 25, 1977.

Appellant first contends that the trial court erred in denying his motion to strike "the unconstitutional enhancement paragraphs" of the indictment. Appellant's contention is that because of the mandatory operation of Section 12.42(d), supra, he has been denied the opportunity to have a jury assess his punishment. Appellant further alleges that his prevention from presenting evidence to the jury concerning the effect of its verdict or facts and circumstances which might mitigate the sentence to be imposed, constitutes a denial of due process

APPENDIX A

of law under the Fourteenth Amendment to the United States Constitution.

These contentions have been repeatedly rejected and are here likewise overruled. Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); McCardell v. State, 557 S.W.2d 289 (Tex.Cr.App. 1977); Passmore v. State, 544 S.W.2d 399 (Tex.Cr.App. 1976); Schultz v. State, 510 S.W.2d 940 (Tex.Cr.App. 1974); Mullins v. State, 409 S.W.2d 869 (Tex.Cr.App. 1966).

By his second ground of error, appellant contends that the trial court erred in denying his motion to suppress a written statement made by appellant to the arresting officers in which he confessed his guilt to the offense. Appellant's complaint is grounded on the assertion that the statement was made at a time when he could not knowingly and intelligently waive his rights under Art. 38.22, V.A.C.C.P. because he was under the influence of heroin.

The record reflects that appellant took the stand in his own behalf at the guilt-innocence stage of trial on the merits and there made a judicial confession to commission of the instant offense. We therefore do not reach the merits of appellant's second complaint; error attending the trial court's admission of the written statement, if any, would be, by appellant's admission, rendered harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Ground of error two is without merit.

In his third ground of error, appellant contends

the trial court erred in denying his requested charge on insanity. Appellant asserts that there was evidence before the jury that he was a heroin addict, and that this raised an issue of temporary insanity at the time of the offense. The State contends, and we agree that the record reflects, that the evidence introduced by appellant does not raise the issue of insanity as a defense because his use of heroin was voluntary.

In Hanks v. State, 542 S.W.2d 413, 416 (Tex.Cr.App. 1976), this Court held that "voluntary intoxication from liquor or drugs. . . is not a defense. . ." to the commission of an offense. See V.T.C.A. Penal Code, Section 8.04(a) and (c). The trial court properly refused appellant's requested jury instruction and this ground of error is overruled.

The judgment of conviction is affirmed.

PER CURIAM

(Delivered September 19, 1979)

BY: Panel 1, 2nd Quarter, 1979, composed of:

John F. Onion, Jr., Presiding Judge
Truman E. Roberts, Judge
Sam Houston Clinton, Judge

NO. 57,555

JAN 31 1980

OFFICE OF THE CLERK
SUPREME COURT, U.S.

MARVIN RAY ROBERTSON, Appellant,	I	IN THE COURT OF
V.	I	CRIMINAL APPEALS
THE STATE OF TEXAS, Appellee.	I	OF T E X A S.

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that MARVIN RAY ROBERTSON, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Criminal Appeals of Texas affirming the judgment of conviction, entered herein on October 31, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Barry J. Brooks,
Attorney for Appellant.
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Dallas, Texas 75201
A/C 214 742-9175

CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the foregoing Notice of Appeal on the Clerk of the Court of Criminal Appeals of Texas, by first class mail, postage prepaid, this 24th day of January, 1980.

Barry J. Brooks

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6015

ORIGINAL COPY

MARVIN RAY ROBERTSON,
Appellant

V.

THE STATE OF TEXAS,
Appellee

ON APPEAL FROM THE
TEXAS COURT OF CRIMINAL APPEALS

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6015

MARVIN RAY ROBERTSON,
Appellant

V.

THE STATE OF TEXAS,
Appellee

ON APPEAL FROM THE
TEXAS COURT OF CRIMINAL APPEALS

MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas, Appellee herein, by and through its attorney, the Attorney General of Texas, and moves to dismiss or affirm the decision of the Texas Court of Criminal Appeals on the ground that the question presented is so insubstantial as to not require further argument.

OPINION BELOW

The unpublished opinion of the Texas Court of Criminal Appeals affirming the judgment of conviction, is reported in Marvin Ray Robertson v. State of Texas, 586 S.W.2d 877 (Tex.Crim.App. 1979), and the opinion is reproduced in the appendix to Appellant's Statement of Jurisdiction.

JURISDICTION

Appellant seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(2).

QUESTION PRESENTED

I. WHETHER ROBERTSON'S SENTENCE OF LIFE IMPRISONMENT FOR BEING AN HABITUAL CRIMINAL VIOLATES THE DUE PROCESS CLAUSE UNDER THE FOURTEENTH AMENDMENT OR IS CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in part:

> No state shall...deprive any person of life, liberty, or property, without due process of law...

Texas Penal Code, article 1.02 provides:

> The general purposes of this code are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate. To this end, the provisions of this code are intended, and shall be construed, to achieve the following objectives:
>
> (1) to insure the public safety through:
>
> (A) the deterrent influence of the penalties hereinafter provided;
>
> (B) the rehabilitation of those convicted of violations of this code; and
>
> (C) such punishment as may be necessary to prevent likely reoccurance of criminal behavior;
>
> (2) by definition and grading of offenses to give fair warning of what is prohibited and of the consequences of violation;
>
> (3) to prescribe penalties that are proportionate to the seriousness of the offenses and that permit recognition of differences in rehabilitation possibilities among individual offenders;
>
> (4) to safequard conduct that is without guilt from condemnation as criminal;
>
> (5) to guide and limit the exercise of official discretion in law enforcement to prevent arbitrary or oppressive treatment of persons accused or convicted of offenses; and

(6) to define the scope of state interest in law enforcement against specific offenses and to systematize the exercise of state criminal jurisdiction.

Texas Penal Code, Article 12.42(d) provides:

> If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life.

STATEMENT OF THE CASE

The textual portion of Appellant's Statement of the Case (Jurisdictional Statement of Appellant at 2-3) is adequate, except that he fails to note the nature of the prior felony convictions used for enhancement. The jury found that Appellant had been convicted for the offense of burglary on January 14, 1972, in Dallas County, Texas, in Cause No. C-72-60-JH, and he was sentenced to serve three years at the Texas Department of Corrections. Further, the jury found that Appellant had been convicted of burglary of a building on October 15, 1974, in Dallas County, Texas, in Cause No. C-74-6670-IH, and he was sentenced to serve three years in the State penitentiary. Also, at the punishment stage of Robertson's bifurcated trial, no objection was made that the imposition of a life sentence constituted cruel and unusual punishment. Instead, at the pretrial stage, Robertson filed a Motion to Strike Unconstitutional Enhancement Paragraphs and the grounds for this motion were never reurged during the trial. Further, the only objection urged by Appellant concerning the court's charge on punishment was that it should include the issue of insanity.

ARGUMENT AND AUTHORITIES

THE TEXAS COURT OF CRIMINAL APPEALS CORRECTLY AFFIRMED ROBERTSON'S LIFE IMPRISONMENT SENTENCE FOR BEING A HABITUAL CRIMINAL BECAUSE ARTICLE 12.42(d) OF THE TEXAS PENAL CODE IS CONSTITUTIONAL.

A. Motion to Affirm

Appellant contends that the Texas Criminal Procedure for sentencing defendants who have been indicted with two prior convictions alleged for enhancement violates the due process clause and therefore constitutes cruel and unusual punishment because it does not allow individualized sentencing for consideration of mitigating circumstances. The specific statute in question, Article 12.42(d) of the Texas Penal Code, provides that once the defendant is found guilty of the primary offense and before he can be sentenced under the provision, "The State must prove that each succeeding conviction was subsequent to both the commission and conviction for the preceding offense." Rummel v. Estelle, 587 F.2d 651, 656 (5th Cir. 1978), aff'd ___U.S.___, 48 U.S.L.W. 4261, No. 78-6386 (U.S. March 18, 1980). This Court clearly held in Spencer v. Texas, 385 U.S. 554 (1967), that the Texas Habitual Criminal Statute then applicable, Texas Penal Code Ann., article 63 (Vernon's 1925), was constitutional.[1] Article 63 is currently codified in article 12.42(d) of the Texas Penal Code Ann. In Spencer, this Court noted that:

> ..No claim is made here that the recidivist statutes are themselves unconstitutional, nor could there be under our cases. Such statutes and other enhanced-sentence laws, and procedures designed to implement their underlying policies, have been enacted in all the States, and by the Federal Government as well.... Such statutes, though not in the precise procedural circumstances here involved, have been sustained in this Court on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities. Moore v. State of Missouri, 159 U.S. 673, 16 S.Ct. 179, 40 L.Ed. 301; McDonald v. Commonwealth of Massachusetts, 180 U.S. 311, 21 S.Ct. 389, 45 L.Ed. 542; Graham v. State of West Virginia, 224 U.S. 616, 32 S.Ct. 583, 56 L.Ed 917; Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed 1683; Oyler v. Boles, 386 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446. (Emphasis added.) Id. at 559-60.

1/ Texas Penal Code, article 63 (Vernon's 1925) provides:

> Whoever shall have three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

Inherent in this Court's finding is the proposition that the Texas Habitual Statute, by providing for a mandatory life sentence without consideration of mitigating factors, violates neither the due process clause nor the cruel and unusual punishment amendment.

In Graham v. State of West Virginia, supra, the Court rejected an Eighth and Fourteenth Amendment challenge to a sentence of life imprisonment imposed by a court after the jury found the accused guilty and returned a verdict identifying Graham as the person previously convicted of other crimes. Earlier, in McDonald v. Commonwealth of Massachusetts, supra, the Court upheld the imposition of a heavier penalty by the trial court after the jury had found the accused guilty of a felony and found the indictment alleging two prior felonies to be true, since the Court found that a Massachusetts Habitual Criminal Statute did not violate the constitutional provision against cruel and unusual punishment. Although the Court has never explicitly stated in these cases that the habitual statutes do not require the trial court to consider mitigating factors in assessing punishment, this notion would be totally contrary to the purpose and the language of such statutes.

Recently, this Court upheld the conviction and sentence of one who had been convicted of a felony and sentenced under the Texas Habitual Statute. Rummel v. Estelle, ___U.S.___, 48 U.S.L.W. 4261, No. 78-6386 (U.S. March 18, 1980). The crimes committed by Rummel were not violent acts, but constituted unlawful acquisitions of others' property. This Court held:

> ...[T]he interest of the State of Texas here is not simply that of making criminal the unlawful acquisition of another person's property; it is in addition the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law. Id., 48 U.S.L.W. at 4264.

Thus, it is clear that this Court recognizes that the State of Texas has legitimate interest in providing for a mandatory life sentence without consideration of other factors when dealing with an habitual criminal.

Appellant's reliance on Lockett v. Ohio, 438 U.S. 586 (1958), Jurek v. Texas, 428 U.S. 262 (1978), Gardner v. Florida, 430 U.S. 349 (1977), Pennsylvania v. Ash, 58 U.S. 51 (1937), and Texas Penal Code article 1.01(3) for support of his contention that the Eighth and Fourteenth Amendment require individualized sentencing is completely misplaced. Appellant is correct in stating that individualized sentencing is a creature of state statutes, but he is not correct in asserting that it should be mandated by the United States Constitution. This Court recognizes "that any 'nationwide trend' toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts." Rummel v. Estelle 48 U.S.L.W. at 4266. Without doubt, it is a legislative function to decide how a person accused of a crime will be sentenced. A state's criminal procedure as it relates to sentencing, "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). "The States have always been given wide leeway in dividing responsibility between judge and jury in criminal cases." Spencer v. State of Texas, U.S. at 560.

Most of the cases cited by Appellant dealt with crimes involving the death penalty. Capital cases occupy a unique place in Eighth Amendment jurisprudence because of the awesome and irrevocable nature of the punishment. See, e.g., Coker v. Georgia, 433 U.S. 584, 598 (1977); Furman v. Georgia, 408 U.S. 238, 290 (1972). Thus, it is quite proper to require individual consideration of mitigating factors in capital cases. However, the considerations found in capital

cases do not come into play in non-capital cases such as this one, since these matters are left to the state legislatures.

Furthermore, Appellant's argument that article 1.03(3) of the Texas Penal Code shows that the State of Texas has a public policy which mandates individualized sentences is ill-founded. The statute, read as a whole, is clearly consistent with article 12.42(d). For example, part of the statute reads " the provisions of this code are intended, and shall be construed, to achieve the following objectives: ...to insure the public safety through...such punishment as may be necessary to prevent likely reoccurance of criminal behaviour...."[2] It is futile to contend that the Texas Legislature intended article 1.02(3) of the Texas Penal Code to be construed to require individualized sentencing in all criminal cases when they enacted article 12.42(d) in the Texas Penal Code.

Appellant does not contend that the imposition of his life sentence was grossly disproportionate to the severity of his crimes. Instead, he only claims that the procedure followed by Texas courts under the Texas Penal Code, article 12.42(d), results in cruel and unusual punishment. This Court stated in Rummel that Texas is entitled to make its own judgment as to where to draw the line in sentencing, "subject only to those strictures of the Eighth Amendment that can be formed by objective factors." Rummel v. Estelle 48 U.S.L.W. at 4266. The question thus becomes what violates the Eighth Amendment.

Prior to this decision, the Court has interpreted the provisions of the Eighth Amendment to bar only punishment that is "barbaric" and "excessive" in relation to the crime committed. Coker v. Georgia, 433 U.S. at 592. In determining whether a punishment is "excessive" and unconstitutional under the Eighth Amendment, this Court has provided the following guidelines: the punishment is unconstitutional if

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2/ See, Texas Penal Code, article 1.02 on page 3.

it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime", then the "punishment must fail the test on either ground." Id. 433 U.S. at 592. To determine whether the punishment passes or fails, objective factors such as the history and precedent of the particular sentence and legislative attitudes must be considered. Id. 433 U.S. at 592. In view of this, it is clear that a life imprisonment sentence under the Texas Habitual Statute is constitutional. See, Rummel v. Estelle, 48 U.S.L.W. at 4262. Appellant's arguments therefore must fail for any one or all the reasons set forth above.

B. Motion to Dismiss

Appellant admits that individualized sentencing is created by state statute and not by a provision in the United States Constitution. (See, p. 5 in Appellant's Jurisdictional Statement). Therefore, this appeal should be dismissed for want of a substantial federal question.

CONCLUSION

For the reasons above stated, Appellant has failed to raise any substantial question indicating that a review of his contentions are needed, and, therefore, his conviction should be affirmed on the record as it stands and the appeal should be dismissed for want of a substantial federal question.

Respectfully submitted,

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PROOF OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, and a member of the Bar of this Court, hereby certify that three copies of the above Motion to Dismiss or Affirm have been served by placing same in the United States Mail, postage prepaid, certified, on this the 3rd day of April, 1980, addressed to: Barry J. Brooks, 2340 Fidelity Union Tower, Dallas, Texas 75201.

GILBERT J. PENA
Assistant Attorney General